No. 14-132

In the Supreme Court of the United States

MICHAEL F. MARTEL, WARDEN, *Petitioner,*

v.

REUBEN KENNETH LUJAN, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Respondent argues first that the question presented is too broadly stated (Opp. 8-10), and last that it depends on an unresolved factual dispute (Opp. 24-27). On the merits, he defends the court of appeals' conclusion that *Harrison* v. *United States*, 392 U.S. 219 (1968), "clearly established" an exclusionary rule that is constitutionally mandated and thus binding on the States. Opp. 11-24. None of these arguments warrants denying review.

1. Respondent correctly observes that *Harrison* and the decision below are limited to circumstances in which a defendant's decision to make incriminating statements in open court was assertedly "impelled" by a trial court's decision—later held to have been erroneous—to permit the prosecution to use the defendant's prior, out-of-court statements in its case-in-chief. See Opp. 8-10; *Harrison*, 392 U.S. at 222. As the petition discusses (Pet. 6, 9, 14-15), both the state court of appeal and the federal courts below decided this case on the factual premise that respondent testified at his trial in response to an erroneous *Miranda* ruling by the state trial court. This Court would review the case on the same basis. That is why the case squarely presents the question whether *Harrison* "clearly established" a rule of federal constitutional law preventing the state court from taking respondent's in-court confession into account in assessing harmlessness—despite other decisions of this Court refusing to exclude evidence derived from *Miranda* violations. See Pet. 18-19.

Acknowledging the factual premise of "impulsion" does not make the question presented "limited" or "narrow." See Opp. 10, 28. If *Harrison* clearly establishes a constitutional rule, it will be the rare case in which a defendant will concede, or the prosecution

will be able to establish, that a decision to testify at trial was not at least in part "impelled." Cf. *State* v. *McDaniel*, 164 S.E.2d 469, 473 (N.C. 1968) (noting that on remand from Supreme Court for further review in light of *Harrison*, defendant argued for first time that "testimony at the trial was 'impelled' by the evidence erroneously admitted or, at least, the State could not prove the contrary").

2. Respondent argues briefly (Opp. 24-27) that this case is not appropriate for review because the lower federal courts never reached his contention that his pretrial confession was constitutionally involuntary. The question here, however, is whether the court of appeals erred in granting relief on a legal theory that makes it completely irrelevant whether respondent's pretrial statements were inadmissible because of a technical *Miranda* violation, or because of some actual violation of his Fifth Amendment rights—or, for that matter, because of a violation of any other law or rule. See Pet. App. 17a. That question is properly presented on the current record.

3. On the merits, respondent defends the court of appeals' conclusion that *Harrison* "clearly established" a federal constitutional exclusionary rule that binds state courts and "bars the use of a defendant's trial testimony as evidence against him if that testimony was offered solely because the [trial court] erroneously admitted his illegal [pretrial] confession." Opp. 11; see Opp. 11-24. As the petition explains, however, that is not correct. See Pet. 13-20. *Harrison*'s holding involved only the application of nonconstitutional rules and required only the exercise of this Court's supervisory authority over proceedings in federal courts. Pet. 14. It did not "clearly establish" any generally applicable constitutional rule.

a. Respondent dismisses petitioner's observation that *Harrison* uses the word "impelled," rather than "compelled," to describe the relationship between erroneous admission of a pretrial confession and a defendant's decision to testify at trial. Opp. 10. In respondent's view, "impelled, compelled, induced or necessitated" all mean essentially the same thing. *Id*. & n.7. But respondent cites no case in which this Court has used the word "impelled" to articulate a Fifth Amendment holding, and petitioner is aware of none. The Constitution does not say that a person may not be "impelled" or "induced" to be a witness against himself. And *Harrison*'s choice of words could not have been casual or inadvertent, because Justice White, in dissent, specifically called attention to the point. See 392 U.S. at 229-230. At a minimum, the Court's decision in *Harrison* does not "clearly" rest on the Fifth Amendment.

Respondent argues that *Harrison* "referenced" authority applying the exclusionary rule under the Fourth Amendment (Opp. 11-12) and that its holding "was rooted in Fifth Amendment principles" (Opp. 13-14)—even if it actually applied only non-constitutional prompt-arraignment rules established by *Mallory* v. *United States*, 354 U.S. 449 (1957), and the Federal Rules of Criminal Procedure. As the petition explains (Pet. 15), however, those references or analogies did not turn *Harrison*'s actual holding into a constitutional one.[1] Indeed, the need to rely on this

[1] Respondent notes (Opp. 12) that *Harrison* discussed the California Supreme Court's decision in *People* v. *Spencer*, 66 Cal.2d 158 (1967), which held that an in-court confession could not be considered in a harmless-error analysis if it was "impelled" by improper admission of a pretrial confession. See *id.* at 163-164. *Spencer* involved pretrial interrogation that was held to violate the defendant's Sixth Amendment right to counsel, not merely "the further guidelines enunciated in *Miranda*." (continued…)

indirect reasoning, or to argue (as the district court here did) that it would be "anomalous" not to extend *Harrison*'s federal exclusionary rule to this case (see Opp. 14-15; Pet. App. 48a-49a), only confirms that *Harrison* itself did not "clearly establish" a constitutional rule binding on state courts. See, *e.g.*, *White* v. *Woodall*, 134 S. Ct. 1697, 1706 (2014) (federal law "does not require state courts to *extend* [this Court's] precedent or license federal courts to treat the failure to do so as error").

b. Respondent also relies, as the Ninth Circuit did, on dicta in *Oregon* v. *Elstad*, 470 U.S. 298 (1985). Opp. 15-16; Pet. App. 13a-14a. He argues that the Court's brief reference to *Harrison* in *Elstad* "reaffirmed" that "*Harrison* meant what it said." Opp. 15. He fails to identify, however, what *Harrison* actually "said" that clearly established a Fifth Amendment holding. The fact that a constitutional reading of *Harrison* would be "consistent" with the language in *Elstad*, and thus with the federal decisions below in this case, does not mean that such a reading is compelled by anything in *Harrison* itself. And, as this Court has repeatedly made clear, it is only a square holding from this Court that would authorize the lower federal courts to reject the state court of appeal's contrary analysis of federal law, itself based on a careful analysis of *Elstad* and other cases from this

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(…continued)
See *id.* at 162 & n.1. As with other authorities cited in *Harrison*, reference to it did not change the legal basis of this Court's holding. And after *Spencer* was decided, the California Constitution was amended to preclude state courts from excluding relevant evidence other than as required by certain traditional evidentiary rules or the federal Constitution. Cal. Const., art. I, § 28, subd. (f)(2) (former subd. (d)); *People* v. *May* 44 Cal.3d 309, 315 (1988).

Court *declining* to exclude reliable evidence based on prior *Miranda* violations. See Pet. 17-20; see generally, *e.g*, *Lopez* v. *Smith*, 2014 WL 4956764 (U.S. Oct. 6, 2014 (per curiam), *3; *Woodall*, 134 S. Ct. at 1702.

c. Respondent cites a number of lower court cases that have held or assumed that *Harrison* was a Fifth Amendment case. Opp. 15, 17-18. On federal habeas review, however, "§ 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence." *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000). "Circuit precedent cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced.'" *Lopez* v. *Smith*, 2014 WL 4956764 at *3.

Moreover, respondent is wrong to suggest that lower court opinions have all concluded that *Harrison* requires exclusion of testimony "impelled" by an erroneous *Miranda* ruling. In *United States* v. *Pulullo*, 105 F.3d 117, 125 n.6 (3d Cir. 1997), the Third Circuit noted that, after *Elstad*, it was "unclear whether Harrison's illegally obtained (but not coerced) confessions would rise to the level of a constitutional violation" and should lead to the exclusion of derivative testimony—even in a federal case. The court did not pursue the question because in the case before it there was a clear underlying constitutional violation. *Id*. In *Leyday* v. *State*, 983 S.W.2d 713, 736 (Tx. Crim. App. 1998), the Texas Criminal Court of Appeals held that, after *Elstad*, "*Harrison* . . . applies only to a defendant's testimony that is the 'fruit' of a coerced confession that is obtained in actual violation of the Fifth Amendment by methods of torture or other means that would cause a person to confess." *Id*. n.18; accord *Baker* v. *State*, 956 S.W.2d 19, 23 (Tx. Crim. App. 1997) ("the *Tucker*/*Elstad* rule applies to the failure to scrupulously honor the invocation of *Miranda* rights. In the absence of actual coercion,

the fruits of a statement taken in violation of *Miranda* need not be suppressed under the 'fruits' doctrine of *Wong Sun*.")

Similarly, in *Rockwell* v. *State*, 215 P.3d 369, 376-377 (Alaska Cr. App. 2009), the Alaska Court of Appeals acknowledged that it remained an open question whether *Harrison* was good authority after *Elstad*. *Id*. at 376 n.54. The court in *Dye* v. *Commonwealth*, 411 S.W.3d 227, 237 (Ky. 2013), drew a distinction between coercive Fifth Amendment violations, where suppression of the fruits is required, and unwarned but voluntary statements, which do not require suppression of the fruits. *Id*. at 237-38. And a Florida appellate court has interpreted *Harrison* as narrowly surviving *Elstad*, but not reaching evidence derived from "a technical violation of *Miranda*." *Rogers* v. *State*, 844 So.2d 728, 734 (Fl. Dist. Ct. App. 2003). These varying decisions all confirm that, at a minimum, respondent's broad interpretation of *Harrison* is not "clearly established."[2]

d. Finally, respondent criticizes petitioner's reliance (Pet. 21) on this Court's decision in *Motes* v. *United States*, 178 U.S. 458 (1900), and the North Carolina Supreme Court's reasoning in *State* v. *McDaniel*, 164 S.E.2d 469 (N.C. 1968), on the ground that those cases "fall outside the scope of *Harrison*" and presented different facts. Opp. 18-21. Both cas-

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[2] Similarly, the Third, Fourth, and Eighth Circuits held, before this Court's plurality decision to similar effect in *United States* v. *Patane*, 542 U.S. 630, 634 (2004), that, after *Elstad*, a *Miranda* violation did not require suppression of derivative physical evidence so long as the defendant's statement was constitutionally voluntary. *United States* v. *Villalba-Alvarado*, 345 F.3d 1007, 1008, 1023 (8th Cir. 2003); *United States* v. *Sterling*, 283 F.3d 216, 219 (4th Cir. 2002); *United States* v. *DeSumma*, 272 F.3d 176, 180 (3d Cir. 2001). See Pet. 18-20.

es, however, support the only proposition for which the petition cites them, which is that the state court of appeal's judgment here was correct on the merits. See Pet. 21. *Motes* instructs that "[i]t would be trifling with the administration of the criminal law to award [a defendant] a new trial because of a particular error committed by the trial court, when in effect he has stated under oath that he is guilty of the charge preferred against him." 516 U.S. at 476. *McDaniel* states a similar view, and observes that, even if admission of a pretrial statement may be subject to later challenge, granting a defendant immunity from future harmless-error consideration of any confirming statement he makes at trial, along with "whatever testimonial excursion he may choose to offer as justification for his conduct" in the hope of securing an unreviewable acquittal, is an "advantage not contemplated" by the Constitution. *McDaniel* v. *State*, 164 S.E.2d at 475.

When a defendant is represented by counsel and chooses to secure the perceived benefits of testifying in his own defense after the arguably improper admission of a pretrial confession, this Court might well hold on the merits that the decision to testify "can hardly be blamed on the confession which in his view was inadmissible evidence and no proper part of the State's case." *McMann* v. *Richardson*, 397 U.S. 759, 768 (1970); see Pet. 18. In this case, however, the question is only whether so holding in a case arising from a state court would require this Court to overrule the holding of *Harrison* or of any other case from this Court. It would not—and, for that reason, the federal courts in this case had no authority to set aside the state court of appeal's own well reasoned

interpretation of federal constitutional law. See Pet. 12-13, 21.[3]

4. In the end, the brief in opposition may be most notable for what it does not argue or cannot establish. Respondent does not contend, for example, that *Harrison* involved, as this case does, the admission at trial of pretrial statements that a state appellate court later held should have been excluded under *Miranda*. Nor can he argue that *Harrison* must have established a constitutional rule because it involved the admission of statements that were constitutionally involuntary, or otherwise taken or admitted in direct violation either of the Fifth Amendment or of any other provision of the Constitution. He does not argue that *Harrison* ever expressly invokes the Fifth Amendment as the basis for its ruling. And he does not suggest that *Harrison* involved, as this case does, how an appellate court should perform harmless-error review when a defendant, however "impelled," has, with the advice of counsel, taken the stand in his own defense and repeated a confession to the jury.

Respondent does not question the basic proposition that a federal court may not overcome the "clearly established" bar raised by § 2254(d)(1) based on federal supervisory rules or dicta. See Pet. 12-13, 14, 17. He does not dispute that *Harrison* involved an exception to a federal evidentiary rule addressing

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[3] Respondent notes that the decision in *McDaniel* was issued after this Court issued a per curiam order vacating an earlier judgment in that case and remanding the matter for further consideration in light of *Harrison*. Opp. 20. Such an order, however, does not reflect a conclusion by this Court concerning the merits, or even the probable merits, of the case. See, *e.g.*, *Lawrence* v. *Chater*, 516 U.S. 163, 168 (1996) (*per curiam*). Certainly it does not dictate the application by state courts, under § 2254(d)(1), of a constitutional proposition that is not "clearly established" by the decision in *Harrison* itself.

confessions obtained in violation of rules applicable only to federal prosecutions. He does not maintain that this Court's reference to *Harrison* in *Oregon* v. *Elstad*, 470 U.S. at 316-317, was essential to this Court's reasoning, or can otherwise be characterized as a holding rather than dicta. See Pet. 17; Opp. 15-16. He does not contest petitioner's point that lower federal courts may not take a decision of this Court addressing only supervisory rules, add dicta from a later case, and thus cobble together a rule "clearly established" by this Court—while ignoring or discounting competing principles and authorities that provide reasonable support for a contrary state court adjudication. And he cannot show that the court of appeals did anything other than that in this case. See Pet. 13-20; cf., *e.g.*, *Lopez* v. *Smith*, 2014 WL 4956764, at *3.

Respondent does not question that an officer's failure to administer fully adequate *Miranda* warnings—the premise on which all lower courts decided this case (see, *e.g.*, Pet. App. 33a-34a)—is not the equivalent of obtaining a coerced confession. Nor does he respond to the reasoning of the state court of appeal (based on this Court's cases) that a *Miranda* violation does not raise the same reliability and deterrence concerns as a coerced confession, and that *Miranda* and even Fifth Amendment violations are materially different from violations of the Fourth Amendment for purposes of assessing whether derivative evidence must or should be excluded as "fruit of the poisonous tree." See Pet. 6-7, 18-20; Pet. App. 221a-231a. As the state court recognized, the important interests underlying *Miranda*'s protections must, at times, yield to other interests of the criminal justice system, such as the search for truth, the centrality of guilt or innocence, and public respect for

the criminal justice system. See *id.*; Pet. 20-21; *Elstad*, 470 U.S. 307-309.

Respondent's decision to confess from the witness stand, however "impelled," was not involuntary under the Constitution. Neither *Harrison* nor any other decision of this Court establishes that a state court must ignore such an in-court confession for purposes of assessing the harmlessness of any error in admitting an inadquately warned pretrial statement—even if the trial court's decision to admit that statement into evidence led to the defendant's decision to take the stand. The state court of appeal's decision to that effect was one that reasonable jurists, applying this Court's precedents, could comfortably reach. And the Ninth Circuit's contrary decision, setting aside a state conviction for a wanton double murder, warrants review and reversal by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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